



### ISSUES

The ALJ denied the claimant compensation after he concluded that claimant's alleged injury did not "arise out of his employment".<sup>1</sup> As a result of this conclusion, the ALJ found it unnecessary to enter findings concerning the remaining issues of notice, average weekly wage, medical expenses, nature and extent of disability and future and unauthorized medical.

In making his determination, the ALJ expressly indicated that he relied on the opinions expressed by Dr. Donald Mead, a physician who was appointed to provide an independent medical examination (IME) pursuant to K.S.A. 44-510e(a) and 44-516. Dr. Mead was appointed as an IME physician following the close of evidence and submission of the case to the ALJ for decision. Originally, the parties' terminal dates were set at the Regular Hearing. The parties submitted their evidence in the normal fashion and tendered their submission briefs to the ALJ. But after considering the record, the ALJ decided, on his own motion and without any notice to the parties, that an IME was warranted. On July 17, 2008<sup>2</sup> the ALJ issued an Order Referring Claimant for Independent Medical Evaluation. That Order directed Dr. Donald Mead to perform an assessment of claimant's condition and render an opinion as to certain issues related to the claimant's claim.

On July 17, 2008, the same day as the Order for the IME examination, the ALJ issued an Order suspending the terminal dates for the claim. Thereafter, claimant was scheduled to see Dr. Mead pursuant to the ALJ's Order.

Sometime in August 2008<sup>3</sup> Dr. Mead authored a report relating to his examination of claimant. The report is not addressed to the ALJ but it does bear a workers compensation date stamp of September 17, 2008 as well as a fax transmission stamp of September 17, 2008. More importantly, this report does not contain any indication that it was sent to either counsel for claimant or respondent. Moreover, there is nothing within the file that suggests that this report was sent by the ALJ to the parties or that the parties were notified of its receipt.

On September 18, 2008, the ALJ sent out another Order advising the parties that the terminal dates are hereby ordered reinstated and that both parties' terminal date was September 18, 2008, the date of the Order.

On September 24, 2008, the ALJ entered his Award denying claimant compensation.

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<sup>1</sup> ALJ Award (Sept. 24, 2008) at 3.

<sup>2</sup> ALJ Order (July 17, 2008).

<sup>3</sup> The report does not contain a specific date. It only references "8//08".

Among the other issues and arguments presented by the parties regarding compensability, the threshold issue the Board must nevertheless address is claimant's assertion that the ALJ violated his rights of due process by deciding this claim without affording him an opportunity to cross examination Dr. Mead regarding his opinions. Put simply, the Board must consider whether Dr. Mead's report is properly to be considered part of the record or if claimant's due process rights were disregarded.<sup>4</sup>

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.<sup>5</sup> The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses testifying at administrative hearings of a quasi-judicial character is an important requirement of due process.<sup>6</sup>

In *Adams*<sup>7</sup>, the Kansas Supreme Court stated:

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

'An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . .'

The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur.2d, Administrative Law, § 412, p. 222:

'. . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . .'

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<sup>4</sup> *McBryde v. Wilson Construction Co.*, No. 169,227, 1996 WL 385321 (WCAB June 28, 1996).

<sup>5</sup> *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 473 P.2d 72 (1970).

<sup>6</sup> *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, 671 P.2d 547 (1983).

<sup>7</sup> *Adams v. Marshall*, 212 Kan. 595, 601-602, 512 P.2d 365 (1973).

In this instance, the ALJ concluded after all of the evidence had been presented that an IME was warranted. And while that decision alone is not necessarily problematic, the Board is troubled by the fact that upon receipt of that report, *a report that was apparently not sent to the attorneys of record*, the ALJ decided to immediately reestablish the terminal dates closing the record and so advised the parties. His award was issued soon thereafter. Essentially the ALJ allowed Dr. Mead's report into the record but gave neither claimant, nor respondent an opportunity to cross examine Dr. Mead about those opinions. Admittedly, claimant could have asked to re-open the record after receiving the ALJ's Order for Independent Medical Examination. But at that point, neither claimant nor respondent knew what Dr. Mead's opinions were going to be. Thus, that may well have been a poor litigation strategy. Once Dr. Mead's report was issued the parties had no opportunity to request the record be held open.

Under these facts and circumstances, the Board has no difficulty finding that the Award should be set aside and the entire case should be remanded to the ALJ. Both claimant and respondent should be given an opportunity to examine Dr. Mead, if requested, and then the entire matter can proceed, thus affording the parties the due process that is mandated.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated September 24, 2008, is set aside the entire matter is remanded to the ALJ for further proceedings consistent with the findings above.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Michael Stang, Attorney for Claimant  
Samantha Benjamin-House, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge